Service of the within and receipt of a copy thereof is hereby admitted this ..... day of March, A.D. 1976.

---

Supreme Court, U. S.
FILED
MAR 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1975
Nos. 75-510 and 75-545

FLINT RIDGE DEVELOPMENT CO., and CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*, *Petitioners,*

*vs.*

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, *Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## Motion to File Amicus Curiae Brief Out of Time and Brief of the California Attorney General as Amicus Curiae in Support of Respondents

EVELLE J. YOUNGER,
*Attorney General of the State of California,*

NICHOLAS C. YOST,
C. FOSTER KNIGHT,
*Deputy Attorneys General,*

110 West "A" Street, Suite 600,
San Diego, Calif. 92101,
(714) 236-7349,

*Attorneys for Amicus Curiae State of California.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

## SUBJECT INDEX


Page

Motion to File Amicus Curiae Brief Out of Time .... 1

Brief of the California Attorney General as Amicus Curiae in Support of Respondents ..... 3

Interest of Amicus Curiae ..... 3

Summary of Argument ..... 5

Argument ..... 7

I

NEPA Supplements the Interstate Land Sales Act; Read Together, These Laws Require HUD to Inform the Public and Other Government Agencies of Potential Environmental Degradation Caused by Rural Subdivision Development ..... 7

Conclusion ..... 13

## TABLE OF AUTHORITIES CITED


Cases — Page

Eastlake Community Council v. Roanoke Associates, 513 P.2d 36 (Wash. S.C. 1973) ..... 7, 8

Friends of Mammoth v. Mono County, 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049 (Cal. S.C. 1972) ..... 4

Juanita Bay Valley Com. Ass'n v. City of Kirkland, 510 P.2d 1140 (Wash. Ct. of App. 1973) ....4, 7, 8

NRDC v. Securities & Exch. Com'n, 389 F. Supp. 689 (DC DC 1974) ..... 13

People of the State of California v. County of Kern, 39 Cal.App.3d 830, 115 Cal.Rptr. 67 (Cal. Ct. of App. 1974) ..... 4

Secretary of Env. Aff. v. Massachusetts Port Auth., 323 N.E.2d 329 (S.J. Ct. Mass. 1975) ..... 4

Miscellaneous

57 Opinions of the California Attorney General (1974), p. 587 ..... 11

Rules

Supreme Court Rules, Rule 42 ..... 1

Statutes

National Environmental Policy Act:

California (Pub. Res. Code §21000 et seq.) ..... 3

Connecticut (Pub. Act No. 73-562, approved June 22, 1973) ..... 3

Delaware (7 §7001 et seq.) ..... 4

Georgia (Ga. Code Ann. Ch. 95-A-1, §241(e)(1)) ..... 4





Page

Hawaii (Haw. Rev. Stat. Ch. 334 (1974)) ..... 3

Indiana (§35-5301 et seq.) ..... 4

Maryland (Ch. 702, Md. Laws of 1973) ..... 4

Massachusetts (C. 30, §61 et seq.) ..... 4

Minnesota (Chap. 412, Laws of 1973) ..... 4

Mississippi (§49-27-11(i), Coastal Wetlands Protection Law) ..... 4

Montana (§69-6501 et seq.) ..... 4

New York (Art. 8, Environmental Conservation Law (1975)) ..... 4

Nevada (§704.820 et seq.; Nevada Air Quality Regulations, Art. 13) ..... 4

North Carolina (Sess. Laws-1971, Chap. 1203) .. 4

North Dakota (§54-01-05, 4 N.D. Century Code) ..... 4

Puerto Rico (T. 12 §1121 et seq.) ..... 4

South Dakota (S.D. Comp. Laws 1967 Ch. 11-1A (Supp. 1974)) ..... 4

Virginia (Chap. 384, approved March 15, 1973) ..... 4

Washington (§43.21C010 et seq.) .....4, 7

Wisconsin (Chap. 273, Laws of 1971) ..... 4

Code of Federal Regulations, Title 40, Sec. 1500.1 ..... 10

National Environmental Policy Act, Sec. 101(c) ..9, 12

National Environmental Policy Act, Sec. 102(G) .. 12

National Environmental Policy Act, Sec. 105 ..... 10

United States Code, Title 15, Sec. 1701 ..... 9

United States Code, Title 15, Sec. 1705 .....9, 12

| | Page |
|---|---|
| United States Code, Title 15, Sec. 1706 | 10 |
| United States Code, Title 15, Sec. 1706(a) | 9 |
| United States Code, Title 15, Sec. 1708 | 9 |
| United States Code, Title 15, Sec. 1714(b) | 9, 11 |
| United States Code, Title 15, Sec. 1716 | 9 |
| United States Code, Title 15, Sec. 1718 | 11 |
| United States Code, Title 42, Sec. 4321 | 8 |
| United States Code, Title 42, Sec. 4331(c) | 9 |
| United States Code, Title 42, Sec. 4332(c) | 11 |
| United States Code, Title 42, Sec. 4332(G) | 8, 12 |
| United States Code, Title 42, Sec. 4333 | 8 |
| United States Code, Title 42, Sec. 4335 | 10 |


Texts


| | |
|---|---|
| Anderson, F., NEPA in the Courts (1973), pp. 49-55 | 6 |
| Anderson, F., The National Environmental Policy Act in Federal Environmental Law (E. Dolgin and T. Guilbert, ed., West Publishing Co. (1974), pp. 239, 287-288, 322 | 6 |
| Yost, Council on Environmental Quality, Environmental Quality—1974 (5th Annual Report, 1974), note 2, pp. 401-409, 421-426 | 4 |
| Yost, NEPA's Progeny: State Environmental Policy Acts, 3 Env. Law Rptr. (1973), pp. 50090, 50095 | 4 |


IN THE

# Supreme Court of the United States

October Term, 1975
Nos. 75-510 and 75-545

FLINT RIDGE DEVELOPMENT CO., and CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,

*Petitioners,*

*vs.*

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## MOTION TO FILE AMICUS CURIAE BRIEF OUT OF TIME

The State of California, acting by and through the Attorney General of California, respectfully requests permission to file out of time an amicus curiae brief in support of respondents pursuant to Rule 42 of the Supreme Court Rules.

Although we do not wish to delay the Court's consideration of this most important case, the Court's decision in this case involving the National Environmental Policy Act (NEPA) will have a major influence

on subsequent interpretations of California's "little NEPA" (the California Environmental Quality Act) which is patterned on NEPA. The California Attorney General is the chief law enforcement officer in the State and has responsibility for enforcing the California Environmental Quality Act.

Respondents' brief was filed March 1, 1976. We were not able to file our proposed amicus curiae brief in support of respondents prior to this time.

Dated: March 16, 1976.

Respectfully submitted,

EVELLE J. YOUNGER,
*Attorney General of the State of California,*

NICHOLAS C. YOST,
C. FOSTER KNIGHT,
*Deputy Attorneys General,*

By C. FOSTER KNIGHT,
*Deputy Attorney General,*

*Attorneys for State of California as Amicus Curiae in Support of Respondents.*



IN THE

# Supreme Court of the United States

October Term, 1975
No. 75-545

FLINT RIDGE DEVELOPMENT CO., and CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,

*Petitioners,*

*vs.*

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## Brief of the California Attorney General as Amicus Curiae in Support of Respondents

### Interest of Amicus Curiae

The State of California is interested in the outcome of this case in that it is one of twenty-five jurisdictions which have adopted laws or regulations patterned on the National Environmental Policy Act (NEPA).[1] An

[1]Fourteen states and Puerto Rico have legislatively adopted little NEPAs of general application. California (Pub. Res. Code § 21000 *et seq.*); Connecticut (Pub. Act No. 73-562, approved June 22, 1973); Hawaii (Haw. Rev. Stat. Ch. 334 (1974));

(This footnote is continued on next page)

interpretation of the National Act is bound to affect construction of the State acts.[2]

A very large number of rural subdivision developments intended for sale or sold interstate are located in California. The interest of amicus curiae is to insure that the National Environment Policy Act (NEPA) is construed in harmony with the Interstate Land Sales

Indiana (§35-5301 *et seq.*); Maryland (Ch. 702, Md. Laws of 1973); Massachusetts (C. 30, §61 *et seq.*); Minnesota (Chap. 412, Laws of 1973); Montana (§69-6501 *et seq.*); New York (Art. 8, Environmental Conservation Law (1975)); North Carolina (Sess. Laws-1971, Chap. 1203); Puerto Rico (T. 12 §1121 *et seq.*); South Dakota (S.D. Comp. Laws 1967 Ch. 11-1A (Supp. 1974)); Virginia (Chap. 384, approved March 15, 1973); Washington (§43.21C010 *et seq.*); and Wisconsin (Chap. 273, Laws of 1971). Five states have legislatively authorized little NEPAs of limited application. Delaware (7 §7001 *et seq.*); Mississippi (§49-27-11(i), Coastal Wetlands Protection Law); Georgia (Ga. Code Ann. Ch. 95-A-1, §241(e)(1)); Nevada (§704.820 *et seq.* Also see Nevada Air Quality Regulations, Article 13); North Dakota (§54-01-05, 4 N.D. Century Code). Five states have administratively promulgated NEPA equivalents. Arizona (Game and Fish Commission policy of July 2, 1971; Policy Memo, Requirements for Environmental Impact Statements, of June 9, 1971); Michigan (Executive Directive 1971-10, issued by Governor); Nebraska (Nev. Dept. of Roads, Department of Roads Action Plan (1973)); New Jersey (N.J. Exec. Order No. 53 (Oct. 15, 1973) and Administrative Order No. 33 (August 1, 1973)); and Texas (Policy for the Environment Adopted January 1, 1973). See: Yost, note 2; Council on Environmental Quality, *Environmental Quality—1974* (5th Annual Report, 1974), 401-409, 421-426. These states look to Federal judicial interpretations of NEPA to construe their own acts, Yost, note 2, at 50095.

[2]*Friends of Mammoth v. Mono County*, 8 Cal.3d 247, 260-261, 104 Cal.Rptr. 761, 769-770, 502 P.2d 1049, 1057-1058 (Cal. S.C. 1972); *Juanita Bay Valley Com. Ass'n v. City of Kirkland*, 510 P.2d 1140, 1146-1147 (Wash. Ct. of App. 1973); *People of the State of California v. County of Kern*, 39 Cal.App.3d 830, 841, 115 Cal.Rptr. 67, 75 (Cal. Ct. of App. 1974); see *Secretary of Env. Aff. v. Massachusetts Port Auth.*, 323 N.E.2d 329, 339 (S.J. Ct. Mass. 1975); also see Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 Env. Law Rptr. 50090, 50095 (1973).



Act (ILSA) to insure that the general public as well as state and local land use regulatory agencies receive as much information as possible on potential environmental degradation generated by rural subdivision developments sold interstate. Amicus curiae believes that the public interest objectives of both NEPA and ILSA are best served by requiring the Secretary of HUD to prepare an Environmental Impact Statement on its filing, registration or certification of Statements of Record and Property Reports on major subdivision developments that—as in this case—could significantly affect the quality of the human environment.

**Summary of Argument**

NEPA and the Interstate Land Sales Act (ILSA) must be construed together to effect their disclosure purposes. NEPA by its terms is supplementary to ILSA. The fact that the Secretary of HUD has very limited discretion over the interstate sale of subdivision developments after the developer files the Statement of Record does not preclude the Secretary from preparing and making available an Environmental Impact Statement on a subdivision development that could significantly affect the environmental quality. Such an EIS would assist prospective purchasers in making informed decisions and enable concerned citizens to fulfill their responsibilities under NEPA to contribute to protecting and enhancing environmental quality by electing not to invest in developments that unnecessarily degrade environmental quality. An EIS would also be of use

to state and local land use regulatory agencies. ILSA's provisions do not prohibit the Secretary from preparing an EIS in this case, nor is compliance with the EIS requirement impossible. On the contrary, NEPA's mandate is that federal agencies, "to the fullest extent possible,"[3] implement its policies and purposes. Amicus curiae believes that there is ample room under both NEPA and ILSA for the Secretary to prepare and make available an EIS on the subdivision developments in this case.

[3]This phrase has an extensive legislative and judicial history. See F. Anderson, *The National Environmental Policy Act* in Federal Environmental Law, 239, 287-288, 322 (E. Dolgin and T. Guilbert, ed., West Publishing Co. (1974); also see F. Anderson, *NEPA in the Courts,* 49-55 (1973).



## ARGUMENT

### I

### NEPA Supplements the Interstate Land Sales Act; Read Together, These Laws Require HUD to Inform the Public and Other Government Agencies of Potential Environmental Degradation Caused by Rural Subdivision Development

Amicus curiae concurs with the result urged in this case by Respondent Scenic Rivers Association. In addition, amicus curiae urges the Court to interpret the provisions of the National Environmental Policy Act (NEPA) to recognize environmental impact disclosure obligations of federal agencies unless existing law applicable to an agency's operations expressly prohibits or makes compliance with such environmental impact disclosure duties impossible. Amicus curiae urges the Court to make it clear that this fundamental precept in NEPA applies even if an agency's statutory powers do not grant it discretionary authority over private development activity, but are rather mainly geared—as in the case of HUD's Office of Interstate Land Sales—to informing the public and protecting the public interest through disclosure of relevant data.[4]

[4]Alternatively, we note that NEPA introduces an element of discretion into agency decision-making that was not previously there. The state of Washington (like California and numerous other states) has a state law patterned on NEPA. (Wash. §43.21C010 *et seq.*) Since Washington courts look to Federal courts' NEPA interpretations for aid in interpreting the state law (*Juanita Bay Valley Com. Ass'n v. City of Kirkland,* 510 P.2d 1140, 1146-1147 (Wash. Ct. of App. 1973); see *Eastlake Community Council v. Roanoke Associates,* 513 P.2d 36 (Wash. S.C. 1973)), the converse may also be pervasive. In interpreting the State Environmental Policy Act the Washington Court has said:

> "The essential point is that SEPA requires the City, acting through its city council, actually to consider the various

(This footnote is continued on next page)

The National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*) provides:

"§4332. The Congress authorizes and directs that, *to the fullest extent possible:* (1) the policies, regulations, and public laws of the United States *shall be interpreted and administered in accordance with the policies set forth in this Act*, and
(2) *all agencies* of the Federal Government *shall*—
". . .
"(G) *make available to States, counties, municipalities, institutions and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment; . . .*" (Emphasis added.) 42 U.S.C. § 4332(G).
"§4333. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiences or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act. . . ." 42 U.S.C. § 4333.
"§4334. Nothing in Section 4332 or 4333 of this title shall in any way affect the specific

environmental factors. The change in the substantive law brought about by SEPA introduces an element of discretion into the making of decisions that were formerly ministerial, such that even if we assumed, arguendo, that the issuance of a grading permit was, prior to SEPA, a ministerial, non-discretionary act, SEPA makes it legislative and discretionary. We hold that the City failed to exercise its legislative discretion under SEPA, and consequently grading permit No. G-023 was issued in a manner contrary to law." *Juanita Bay Valley Com. Ass'n v. City of Kirtland, supra,* 510 P.2d 1140, 1149 (Wash. Ct. of App. 1973); see *Id.*, at 1147-1148; also see: *Eastlake Community Council v. Roanoke Associates, supra,* 513 P.2d 36 (Wash. S.C. 1973).



statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon recommendations or certification of any other Federal or State agency.
"§4335. The policies and goals set forth in this chapter are *supplementary* to those set forth in existing authorizations of Federal agencies." (Emphasis added.)

NEPA's policies also make it clear that each citizen "has a responsibility to contribute to the preservation and enhancement of the environment." NEPA, Sec. 101(c), 42 U.S.C. § 4331(c).

Petitioners have sought to limit the application of NEPA in this case by pointing out that HUD's Office of Interstate Land Sales have no discretionary authority over private subdivision development subject to ILSA. Petition for Writ of Certiorari, page 10. Petitioner argues that "HUD's powers under the Act [ILSA] are limited to assuring that when developers sell lots, they disclose relevant facts to potential purchasers", and that HUD's performance of this disclosure function does not constitute a "major federal action" requiring the preparation of an EIS. Petition for Writ of Certiorari, page 10.

The Interstate Land Sales Act (15 U.S.C. § 1701 *et seq.*), however, was enacted not solely to protect purchasers but includes the broader objective of protecting prospective buyers and the "public interest." 15 U.S.C. §§ 1705, 1706(a), 1708, 1714(b), 1716.

As previously pointed out, NEPA Sec. 105 (42 U.S.C. § 4335) provides that NEPA's goals and policies are "supplementary" to existing statutes governing an agency's operations. The Council on Environmental Quality's *Guidelines For Federal Agencies Under The National Environmental Policy Act* (40 C.F.R. § 1500.1 *et seq.*) expressly require that "each agency of the Federal Government *shall* comply with that section [Sec. 102] unless existing law applicable to the agency's operations *expressly prohibits or makes compliance impossible.*" A review of ILSA's provisions nowhere discloses an express prohibition against the Secretary's preparation of an EIS in conjunction with the filing or registration of Statements of Record and Property Reports for the purpose of providing environmental impact information to prospective purchasers and state and local regulatory agencies. Nor does ILSA make compliance with NEPA impossible. Petitioners have pointed out that ILSA requires the Secretary to make Statements of Record effective within 30 days after they are filed, and that no EIS could possibly be prepared, circulated, commented on, and reviewed within that period. Petition for Writ of Certiorari, page 13. An EIS requirement, petitioners argue, would render 15 U.S.C. § 1706's 30-day requirement a nullity. Petition for Writ of Certiorari, page 14.

However, there is nothing in ILSA that prevents the Secretary from requiring developers intending to qualify for interstate sales from giving the Secretary 3 or 4 months' notice in advance of filing their Statements of Record or Property Report.[5] As petitioners

[5]In California, under our "little NEPA" we have construed that act together with the State's Forest Practice Act so as to harmonize both statutes in such a way as to require preparation of the state equivalent of an EIS prior to the running of a short period granted for approval of a timber harvesting plan. 57 Ops Cal.Atty.Gen. 587 (1974).



have pointed out, developers often have undertaken extensive planning, financing and other work before they come to HUD to file their Statements of Record. ILSA itself gives the Secretary broad rulemaking authority to implement the disclosure purpose of that Act. 15 U.S.C. § 1718. The Secretary is also authorized to "publish information," and to ". . . investigate facts, conditions, practices or matters" related to interstate sale of subdivision developments not only to aid in enforcement of ILSA but also for the purpose of

> ". . . prescribing of rules and regulations . . ., or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates." 15 U.S.C. § 1714(b).

The above-quoted section, for example, would certainly appear to authorize, indeed encourage, the Secretary to prepare an EIS on its entire role in interstate sales of subdivision developments and the need for further legislation. NEPA's Section 102 dovetails with this provision in requiring federal agencies to prepare an EIS on "every recommendation or report on *proposals for legislation.*" 42 U.S.C. § 4332(c). (Emphasis added.)

The provisions in ILSA governing the content of Statements of Record are consistent with NEPA's objective of providing the general public (prospective purchasers) and state regulatory agencies with environmental impact information which the federal agency

has *or is able to obtain* from its operations. 15 U.S.C. § 1705; NEPA Sec. 102(C)(G); 42 U.S.C. § 4332(G). As the District Court for the District of Columbia has said, with respect to NEPA's application to the Security Exchange Commission's disclosure function:

> ". . . the principal purposes of the federal security laws is full disclosure of material information; this purpose reflects the Brandeis philosophy that 'sunlight is said to be the best of disinfectants' [citation omitted]. Plaintiffs would use the corporate disclosures they seek [*e.g.*, the nature and extent to which a company's product or activity causes pollution or injury to natural areas, and the feasibility for correcting environmental damage] not only in their role as public educators, but also as investors and voting shareholders making informed, socially responsible investment decisions. Secondly, Congress declared in NEPA (1) that one of the purposes of NEPA is 'to promote efforts which will prevent or eliminate damage to the environment' and (2) that 'each person has a responsibility to contribute to the preservation and enhancement of the environment' and (3) that 'all agencies of the Federal Government shall— . . . make available to states, . . . institutions, and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the environment'. Plaintiffs seek through public education, investment of funds, and voting of shareholdings, to do their part to encourage corporate responsibility in environmental matters. This Court can conceive of no other individuals or institutions who could have a greater interest



> which NEPA protects than Plaintiffs." *NRDC v. Securities & Exch. Com'n,* 389 F. Supp. 689, 698 (DC DC 1974).

Similarly in this case, prospective purchasers of subdivision developments sold interstate have a right and responsibility to know whether their investment in such developments would contribute to unnecessary degradation of environmental quality. NEPA and ILSA's purposes can be effectively harmonized by requiring the Secretary to provide information on potential environmental impacts of subdivision developments in the form of an EIS or otherwise, to prospective purchasers so that concerned citizens may elect not to purchase developments that are unnecessarily destructive of environmental quality. Since NEPA is supplementary to ILSA's provisions, and since NEPA's command is that federal agencies comply "to the fullest extent possible,"[8] amicus curiae believes that the Tenth Circuit's decision correctly harmonized the two statutes in requiring the Secretary to prepare an EIS in this case.

## Conclusion

Both NEPA and ILSA are disclosure statutes for the benefit not only of federal agencies in making decisions to the extent their enabling legislation allows, but also to provide the general public and prospective purchasers with an opportunity to contribute to the preservation and enhancement of the environment. Although the Secretary's discretionary authority over the approval of subdivision developments

---

[8] *Supra,* note 3.

intended for interstate sale is very limited, the Secretary has the ability and is not precluded by existing law from obtaining relevant environmental impact data on such subdivision developments, and making it available to prospective purchasers and state and local land use regulatory agencies, in the form of an EIS or otherwise. The decision below requiring the preparation of an EIS in this case should be upheld since it correctly harmonizes the purposes and intent of both NEPA and ILSA.

Dated: March 16, 1976.

Respectfully submitted,

EVELLE J. YOUNGER,
*Attorney General of the State of California,*

NICHOLAS C. YOST,
C. FOSTER KNIGHT,
*Deputy Attorneys General,*

*Attorneys for Amicus Curiae State of California.*

see

7 5

5 4 5